Nos. ~~83-256 and~~ 83-5108

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ALEXANDER FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was plain error justifying reversal to instruct the jury, in connection with petitioners' entrapment defense, to determine petitioners' predisposition at the time they committed the offense.

2. Whether petitioners' convictions on bribery-related offenses should be reversed because government undercover agents offered large sums in exchange for the improper use of a United States Senator's influence.

3. Whether evidence of prior similar acts was incorrectly admitted against petitioner Feinberg.

4. Whether warrantless electronic recordings of a meeting, made with the consent of at least one party to the meeting, violate the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 705 F.2d 603. The opinion of the district court (Pet. App. 46a-87a) is reported at 529 F. Supp. 1085.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1983 (Pet. App. 88a-89a). A petition for rehearing was denied on May 24, 1983 (Pet. App. 90a-91a). The

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[1] "Pet. App." refers to the appendix to the petition in No. 83-256.

petition for a writ of certiorari in No. 83-5108 was filed on July 22, 1983. In No. 83-256, Justice Marshall extended the time for filing a petition for a writ of certiorari to August 22, 1983, and the petition was filed on August 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, each petitioner was convicted on two counts of bribery, in violation of 18 U.S.C. 201(c); two counts of receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g); two counts of unlawful conflict of interest, in violation of 18 U.S.C. 203(a); and two counts of interstate travel to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[2] Each petitioner was also convicted on one count of conspiracy to commit these substantive offenses and to defraud the United States, in violation of 18 U.S.C. 371. Petitioner Williams was sentenced to concurrent terms of three years' imprisonment and fines totalling $50,000. Petitioner Feinberg was sentenced to concurrent terms of three years' imprisonment and fines totalling $40,000. Pet. App. 4a-5a.

1. In 1975, Henry A. (Sandy) Williams, III, a friend and business associate (but not a relative) of petitioner Williams, who was then a United States Senator from New Jersey, acquired an option on mining property in Piney River, Virginia.[3] Sandy Williams believed that property to be rich in titanium, and he discussed the mine's potential

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[2]The district court granted petitioner Feinberg's motion for judgment of acquittal on one of the counts charging interstate travel to conduct the unlawful activity of bribery (Pet. App. 58a-59a), and that count is not now in issue.

[3]Sandy Williams testified for the government at the trial under a grant of immunity (Pet. App. 5a).

with Senator Williams, saying that he would need help in making the venture operative. Senator Williams told Sandy Williams "that he would 'give [the mining project] all the help that he could' " (Pet. App. 6a). In return Senator Williams was to receive one half of Sandy Williams's interest in the corporation that owned the mine. *Id.* at 5a-6a.

In 1976, Sandy Williams exercised the option on the Piney River property. He had a 28 1/3% interest (including that committed to Senator Williams) in the corporation that took title to the property. On March 23, 1976, Sandy Williams executed a document acknowledging Senator Williams's half interest in his share of the corporation; Senator Williams retained that document in his office. Petitioner Feinberg, a "long-time friend and associate" of Senator Williams, also acquired an interest in the mining venture, "in return for his looking after the Senator's interests and helping to make presentations to potential investors" (Pet. App. 7a). The venture remained dormant, however, because it lacked the necessary capital (*id.* at 6a).

In January 1979, Angelo Errichetti, then Mayor of Camden, New Jersey, mentioned to Senator Williams that he had established contact with wealthy Arab sheiks seeking to invest a large amount of money. The people whom Errichetti contacted were in fact FBI undercover operatives engaged in what has come to be known as the Abscam investigation. Senator Williams told petitioner Feinberg to contact Errichetti about the investors and " 'see what the hell's going on.' " Pet. App. 6a-7a.

Soon thereafter, Feinberg, Errichetti, and Sandy Williams arranged a meeting with two persons — FBI informant Weinberg and an FBI agent — who were posing as representatives of the wealthy sheik. Errichetti told the sheik's representatives that Feinberg was Senator Williams's "bagman." Feinberg made it clear that Senator Williams

had an undisclosed interest in the mine and said that Senator Williams was eager to see the venture funded. Pet. App. 7a, 51a. Sandy Williams initially suggested to the undercover agents that $13 million would be needed to fund the venture; in early March, he revised that estimate to $100 million, explaining that the mining corporation should purchase a nearby processing plant. *Id.* at 7a.

Senator Williams met with the sheik and his representatives on seven different occasions (Pet. App. 52a). His first meeting with them was on a yacht in Florida on March 23. Two days before that meeting, Sandy Williams told Senator Williams that the meeting was "important," and Senator Williams replied: "Sandy, look, I will do everything possible to get that money." At the meeting, Senator Williams said to one of the sheik's representatives that he would "assist * * * in any way possible in getting this project going." The next day, Errichetti told the sheik's representatives that the Senator "can be of service to you in Washington or wherever. This is Government stuff, now." *Id.* at 7a-8a.

In May 1979, George Katz, another friend of the Senator who was also a participant in the mining venture, read a newspaper article describing the government's need for titanium for defense purposes. Katz then suggested — in a telephone call to informant Weinberg, who was acting as the sheik's representative, and in a conversation with Sandy Williams — that the Senator could help the venture by obtaining government contracts.[4] On May 30, Weinberg,

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[4]In its opinion rejecting petitioners' challenges to the verdicts, the district court described Katz as "a businessman with a known criminal background" (Pet. App. 63a).

Katz and Errichetti were indicted with petitioners. Katz was severed because he was too ill to stand trial. Errichetti was severed because he was tried (and subsequently convicted) on charges arising out of another aspect of the Abscam investigation. See *Myers* v. *United States*, cert. denied, No. 82-1255 (May 31, 1983).

pursuing Katz's suggestion, asked Feinberg in a tape-recorded conversation whether Senator Williams could "do something on getting us the contracts." Feinberg replied: "We can try." The next day, Senator Williams again met with the undercover agents. Immediately before the meeting, Feinberg told Weinberg, in a conversation that was again recorded: "On the contracts, I can tell you now that he will open up the doors for us. And use his, you know what I'm talking about, to get the contracts." Pet. App. 8a-9a.

Also immediately before meeting the agents, Senator Williams met with Feinberg and Sandy Williams. Sandy Williams testified that at this meeting, Feinberg told Senator Williams, calling him by his nickname, "Pete, the important thing [a]bout this meeting is going to be your help in getting government contracts." The Senator replied: "I understand." Pet. App. 9a-10a.

After the subject of government contracts arose at the meeting with the agents, Senator Williams remarked, "I can't say yes or no, sure try." The court of appeals described the context in which this remark occurred (Pet. App. 10a; footnote omitted):

> The audio tape of this meeting is inaudible as to the conversation preceding the Senator's remark, but other evidence abundantly permitted the jury to conclude that the Senator was referring to his role in obtaining government contracts. First, the conversations just prior to the [meeting] indicate that the Senator understood his role. Second, [undercover agent] Amoroso [acting as a representative of the sheik] * * * testified that the Senator's willingness to "try" was expressed in response to a statement that the Senator's aid in obtaining government contracts was one of the reasons for the loan. Third, after the meeting, both

Feinberg and Sandy Williams reminded the sheik's representatives that the Senator had said he would try to get government contracts.

On June 28, the Senator again met with the sheik and his representatives and, in an effort to persuade them to make the loan, boasted of his influence in the government. In the course of this videotaped conversation, Senator Williams spoke of his close relationship with the Vice-President and the Secretary of State and said that he would be pleased to speak personally with the President on behalf of the mining venture. Pet. App. 11a.

At this meeting, Senator Williams mentioned the output of the mine and commented, "knowing the need of our country, being here in a position to go to ah well, you know, right to the top on this one." Agent Amoroso, posing as the sheik's representative, said to Senator Williams that the sheik "feels that with you behind this thing, with the people that you know, the ah government contracts, available, you know, this whole thing —." Senator Williams's reply was: "Right through." Agent Amoroso then commented that he wanted the Senator to meet the sheik because otherwise the sheik "would've felt it was just another business deal." Errichetti then said: "Well, without the Senator, there is no — forget it. There's no, no mines or nothing." Senator Williams said: "Yes, I, I've been here decades and, uh, in that position you come up to those positions and you work with the people that make the decisions." The following exchange then occurred:

Amoroso: Well, then, there — in that respect, then, with you being in that position and contracts and, uh, the like would not be a problem.

Williams: No problem. No. In a situation where we can just sit around and describe, they'll see, it will come to pass.

Pet. App. 11a-13a.

During the same videotaped conversation, Senator Williams explained that he was being helpful because "I'm not gonna be in this situation forever and I want to have a you know foundations which give me that independence when I, later time." Senator Williams and Amoroso then agreed that stock certificates intended for Senator Williams would be issued initially to Feinberg, who could transfer them to the Senator at some later time. At a subsequent recorded meeting, on August 5, Senator Williams accepted stock certificates representing an 18% share in the corporations Feinberg had formed to carry out the mining venture. In keeping with their agreement, the certificates were made out to Feinberg, who endorsed them in blank. The court of appeals quoted the following excerpt from the recorded conversation, in which, it noted, Senator Williams "acknowledged his understanding of the arrangement":

Amoroso: [T]hese are the certificates and I had Alex endorse them. . . .

. . . . .

Williams: And he just endorsed these over then.

Amoroso: Yeah.

Williams: In blank.

Weinberg: Right.

Williams: Very good.

Weinberg: So they're blank you can leave them blank and when you want to put your name in it you can put your name in it.

Pet. App. 13a-14a.

2. At the same meeting, the sheik's representatives suggested that another group of Arab investors might be willing to buy the mining venture outright. According to

Sandy Williams's testimony, Senator Williams twice told his associates that, as part of the purchase transaction, he would agree to seek government contracts on behalf of the new owners. At a subsequent videotaped meeting at which the proposed sale was discussed, Weinberg said to Senator Williams: "The whole thing on this sale depends [on] you and the government getting the contracts for us cause the whole thing depends upon it. * * * If you have any qualms about it, you wanna keep it the same, it makes no difference to me either way. But the whole thing depends upon you to work the same capacity as you working for us to get us government contracts." Senator Williams agreed, saying: "We got this all together on certain premises and they will, they will continue." Pet. App. 15a-16a. At a videotaped meeting on October 7, Senator Williams, Feinberg, and Amoroso discussed ways in which Senator Williams's profits from the sale of the venture could be concealed until he retired; they agreed to use some form of blind trust, and Senator Williams remarked that such an arrangement would ensure that "nobody knows nothing" (*id.* at 16a-17a).

ARGUMENT

1. a. Petitioner Williams's principal contention (83-256 Pet. 12-19), joined by petitioner Feinberg (83-5108 Pet. 36-37), is that the convictions should be reversed because of a supplemental instruction that dealt with petitioners' entrapment defense. During its deliberations, the jury sent a note to the district judge asking the following question (Pet. App. 30a):

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

Petitioner Williams's counsel noted that the question appeared to presuppose that the defendants had the burden of proof; he contended that since it was undisputed that the

government had induced petitioners to commit the offense, the government had the burden of proving predisposition beyond a reasonable doubt. Petitioner Williams's counsel further urged that the government had to prove "from on or about the first day of January, 1979, these two men were predisposed beyond a reasonable doubt." Petitioner Feinberg's counsel, taking issue with petitioner Williams's attorney, argued that "when he says that you have to have entrapment from square one, the answer is no, no, no, no." Pet. App. 30a.

When the jury was recalled, the district judge explained that since inducement had been shown, the burden of proving predisposition was on the government, not the defendants. He then made the statement to which petitioners object:

> You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.

Pursuant to an agreement reached with counsel before the jury was recalled, the trial judge then repeated the charge on entrapment he had previously given. After the jury again retired, the district judge asked if counsel had any objections; except for reiterating their objections to the initial charge, they made none. Pet. App. 31a.

The court of appeals ruled that "[a]s a general proposition of law" the challenged supplemental instruction "was erroneous" because "[n]ormally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime" (Pet. App. 31a-32a). But the court of appeals nonetheless declined to reverse the convictions "[i]n the circumstances of this

case" (*ibid.*). The court explained (*id.* at 32a-33a; footnotes omitted):

> First, neither counsel, after hearing the statement, objected to it or asked for a clarifying instruction. Second, neither counsel had suggested to [the district judge] a correct statement of the law that would have answered the jury's questions. [Petitioner Williams's counsel's] initial suggestion that predisposition had to be proved from "day one . . . on or about the first day of January, 1979" was, as [the district judge] noted, an overstatement. The earliest that predisposition had to be established was as of the time when the agents first presented the criminal opportunity to the defendants, which was May 30 with Feinberg and May 31 with the Senator. There was no reason to focus the jury's attention on the Senator's state of mind at the start of the indictment period, which was five months before any criminal opportunity was broached by the undercover agents. Third, the isolated remark complained of was followed by a rereading of the full charge on entrapment, which correctly set forth the applicable principles * * *.

Finally, and "most important," the court explained, "the statement as to time of predisposition was not prejudicial because the criminal opportunity was accepted when it was first presented. The time when the crime was first committed virtually coincided with the pertinent time for assessing predisposition. Thereafter the Senator simply repeated and emphasized his willingness to commit the crimes." *Id.* at 32a-34a.

b. Petitioners' principal contention is that the government must prove that they were predisposed to commit a crime when "the Government agent first approached the[m]" (83-256 Pet. 16) — before any illegality was

broached. This is wrong. As the court of appeals explained (Pet. App. 32a n.9):

> In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. * * * Since the entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime, and those efforts will normally not occur until the criminal proposition has been broached. Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

As the court of appeals recognized,[5] it may be possible to imagine cases in which the jury, in deciding whether a defendant was predisposed, should consider whether government agents created in the defendant a willingness to commit a crime before they actually made an explicit suggestion of criminality. But this is plainly not such a case. Between January 1979, when Senator Williams's associates first contacted the Abscam investigators, and May 1979, the first occasion on which a government agent suggested illegal activity in connection with the mining venture, Abscam operatives did nothing that might have made a law-abiding person willing to engage in criminal acts. The agents simply gave petitioners and their associates an opportunity to act in the way they would have acted toward anyone who expressed an interest in investing money in their venture. Government agents did not concoct the mining venture; they did not induce Senator Williams to accept a financial interest in the venture, for he had done so before the

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[5]See Pet. App. 32a n.9 ("We do not rule out the possibility * * * that cases may arise in which the agents in their preliminary contacts with a target indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one.").

Abscam investigation even began. Nor did they persuade Senator Williams to take an active role in promoting the venture: Senator Williams's immediate reaction upon hearing of the wealthy Arabs was to ask petitioner Feinberg to pursue the matter further; the Senator's associates freely bandied his name about, apparently with his assent; and the Senator met with the undercover agents in March to demonstrate his active support for the venture. If, in January 1979, petitioners and their associates were disposed to obtain financing only through lawful means, nothing the undercover agents did prior to the time criminal conduct was suggested would have changed that disposition.

In addition, as the court of appeals noted, trial counsel did not object to the district judge's supplemental instruction, even though the judge specifically gave them an opportunity to do so. If the precise timing of the inquiry into predisposition were as central to the defense as petitioners now suggest, it is difficult to understand why there was no objection. See also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (footnote omitted) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.").

Finally, as the court of appeals again noted, the district court reread the full entrapment instruction immediately after it gave the supplemental instruction. Taken as a whole (see, *e.g.*, *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); *United States* v. *Parisi*, 674 F.2d 126, 127-128 (1st Cir. 1982)), the instructions made it clear to the jury that it should acquit the defendants if it believed that government agents instilled in them a disposition to commit the crimes:

> The term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act.

> * * * [I]n their efforts to enforce the laws, government officials and their agents may not entrap an innocent person who, except for the government inducement, would not have engaged in the criminal conduct charged. * * * [If government agents] initiate, entice, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct, the government may not obtain a conviction based upon the fruits of that instigation. * * *
>
> * * * * *
>
> In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator[s] Sandy Williams, George Katz, and Angelo Errichetti. * * *

Pet. App. 92a-94a. See also Pet. App. 33a n.10.

2. Both petitioners also contend that the government's conduct was so outrageous that their convictions should be reversed on due process grounds (83-256 Pet. 20-27; 83-5108 Pet. 23-29). These contentions are without merit. The record shows that the agents acted properly at each stage of the investigation.

The agents did not approach petitioners to discuss the mining venture; Feinberg and Sandy Williams approached the agents through Errichetti. At the first meeting in January 1979, Feinberg made it clear that Senator Williams had

an interest in the venture, and Errichetti described petitioner Feinberg as the Senator's "bagman." Senator Williams then agreed to meet with the agents. After that meeting, Errichetti told them that the Senator could "be of service to you in Washington." Pet. App. 6a-8a.

The agents were surely under no obligation to ignore these broad hints of corruption. As the district judge, who presided over the trial, explained in rejecting petitioners' motions to set aside the verdicts (Pet. App. 62a-63a):

> As early as March, 1979 there had been presented to the Abscam investigators, at defendant Williams' initiative, a proposed business venture whose principals included a businessman with a known criminal background (Katz), a grossly corrupt local politician (Errichetti), a lawyer (Feinberg) who was advertised by one of his own co-venturers as a "bag man" and who showed he was willing, if not anxious, to pay and receive bribes * * *. All three of them were enthusiastically pushing a titanium mine in which a United States Senator (Williams) had a hidden interest.

In this context, petitioners' associate Katz proposed that Senator Williams's influence could be used to obtain government contracts. When an agent repeated that proposal to petitioners, petitioners considered it briefly and then readily accepted. In short, the agents merely undertook the investigative actions needed to expose the corruption that they had good reason to believe was present.[6]

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[6]Petitioner Williams emphasizes his refusal, at one meeting with the sheik, to accept a cash bribe in return for assisting the sheik in obtaining permanent resident status in the United States (83-256 Pet. 9-10). But petitioner Williams does not mention that, after having been offered that bribe, he did not terminate the conversation; he continued to discuss the titanium mine with the sheik and, in connection with the mining venture, said that he would help the sheik with his immigration problems (see Pet. App. 23a-24a).

a. Petitioners assert that the large amount of money offered by the undercover agents created an unreasonably great temptation (see 83-256 Pet. 25; 83-5108 Pet. 25-29). But petitioners first agreed to use Senator Williams's influence in exchange for a loan, not a payment of cash. The amount of the loan that the group hoped to obtain was specified, not by government agents, but by petitioners' associate Sandy Williams. Moreover, as the court of appeals and the district court pointed out, the loan was to be repaid with interest; thus its value to petitioners "was not the amount of the loan, but rather the profits they anticipated making as a result of securing financing for their venture. Whatever profits were anticipated were the result of the defendants' estimates; the agents did not offer to assure any particular level of profits in connection with the proposed loan." Pet. App. 36a-37a; see *id.* at 75a.

It appears that the sale transaction, unlike the loan, would have guaranteed a substantial profit for petitioners. But by the time the sale was proposed, petitioners had already entered into one corrupt bargain in return for the loan. Thus they cannot plausibly suggest that the size of the inducement involved in the sale was decisive in overcoming their reservations about acting illegally. In addition, as the court below noted, the sale price was again based on "figures already proposed by the principals in the mining venture" (Pet. App. 37a). Indeed, during the negotiations Senator Williams urged that the sale price be increased. "When a Senator elects to interest himself in transactions involving large sums of money, he cannot claim that it is unconstitutional for undercover agents to frame their offers of criminal opportunities within the financial context he has already established." *Ibid.*[7]

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[7]See also Pet. App. 37a: "There is no evidence that the Senator's anticipated share of the profits from the loan or the sale exerted an unconscionable pressure upon him."

Moreover, the dollar amount of an inducement cannot be the sole factor in evaluating the propriety of the government's investigative activity. Petitioners were selling something — the influence of an important United States Senator — that can be of enormous value to a person who has a financial stake in the outcome of a government decision. The government and the public accordingly have a strong interest in determining whether a Senator can be corrupted even by very large amounts of money. See Pet. App. 37a ("We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator.").

At the same time, it is difficult to see how petitioners can claim that they were treated unfairly. They were not in desperate financial condition. They were, it appears, sophisticated businessmen; if, at the time of the proposed transactions, they considered the amounts being offered to be excessive, they must have thought that they were taking advantage of ignorant or gullible investors. On the other hand, if at the time of the proposed transactions they considered the amounts to be reasonable in view of what they were offering, it is difficult to see how the inducement can be viewed as excessive.[8]

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[8]Petitioner Williams urges (83-256 Pet. 23-25) that the government violated its own guidelines in carrying out the investigation. Contrary to petitioner Williams's suggestion, of course, such guidelines would not define the limits that the Due Process Clause places on law enforcement activity; it is not only appropriate but salutary for the executive branch to go beyond constitutional requirements in regulating its criminal investigations (see *United States* v. *Russell*, 411 U.S. 423, 435 (1973)), and when it does so the restrictions it imposes are not ordinarily enforceable in court (see *United States* v. *Caceres*, 440 U.S. 741 (1979)).

It is also unclear which "guidelines" petitioner is invoking. We are advised by the United States Attorney's office that DP Exh. 110, which petitioner quotes, consists of testimony given by government officials,

b. Petitioner Williams also suggests (83-256 Pet. 25, 26) that the government's conduct of the investigation violated the Due Process Clause because he was "coached" by Weinberg to say that he would aid the investors in obtaining government contracts. But as both courts below noted, when petitioner Williams testified at trial he specifically and repeatedly denied that the "coaching" influenced his behavior. See Pet. App. 27a-28a, 66a-69a. The district judge, who presided over the trial, found that "despite the prompting and 'coaching' by Errichetti and Weinberg before his meeting with the sheik on June 28, 1979, defendant Williams acted voluntarily and intentionally in that meeting and was not influenced to say or do anything that he had not previously agreed to say and do; consequently, Williams was not prejudiced by the conduct of Weinberg and Errichetti" (*id.* at 70a). "At trial Williams' own attorney exhaustively questioned him about the effect of Weinberg's suggestions and comments" (*id.* at 66a-67a), and when asked about Weinberg's "coaching," petitioner Williams testified (*id.* at 27a n.7):

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after the Abscam operation became publicly known, to a House committee investigating the operation. In that testimony, the officials explained that the operation did conform to the proper standards for regulating such investigative activity.

In any event, the investigation in this case did not violate the "guidelines" that petitioner attributes to the government. The Abscam agents had reason to suspect that criminal activity was afoot from the time of their first meeting with Feinberg, Errichetti, and Sandy Williams, because it was at that meeting that they learned of Senator Williams's hidden interest in the mine and heard Errichetti — the mayor of a large city and an associate of the Senator — describe Feinberg as the Senator's "bagman." The agents made it clear to Senator Williams and his associates that they were interested in exchanging Senator Williams's help in securing contracts for valuable consideration. And for the reasons we have explained, the inducements did not exceed what the "real world" might offer to a United States Senator and those seeking to profit from peddling his influence.

> I think I said yesterday, this is not for me, what he's talking about, that kind of effort to impress the Sheik. I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.

Similarly, when petitioner Williams was asked whether he was offended by what Errichetti and Weinberg told him to say, he replied (Pet. App. 28a n.7): "It was offensive but it didn[t] mean a great deal to me to tell you the truth." At another point petitioner Williams testified (*id.* at 67a; emphasis added by the district court):

> Q. Senator, now Weinberg is saying to you clearly, government contracts, using your influence. And all you are saying here is um-hum, gotcha, um-hum, um-hum. What were you thinking when this was going on?
>
> A. What I started to develop a moment ago, while he's going on this way I was thinking of what I was going to develop when I got upstairs. * * * *but there can be no exaggeration, no statement of things I know I could not do, would not do* in no shape was I going to be associated with, even in a baloney sense as they called for, and that was a contract.

Petitioner Williams also testified (Pet. App. 27a-28a n.7):

> Q. And didn't Errichetti tell you on June 19th that the only thing the sheik was interested in is your telling him that you would get government contracts?
>
> A. If he said that, it didn't register with me because my mind was not accepting government contracts as any part of this thing.

As the district court explained (Pet. App. 69a):

> At trial, Williams' position was essentially that the videotape did not incriminate him, but the jury obviously rejected his argument. Now, Williams asserts

> that the incriminating statements he made on videotape were the product of coaching; but his sworn testimony unequivocally establishes that his statements and action on camera were voluntary and intentional. They cannot be dismissed as merely the product of Weinberg's urgings.

Since petitioner Williams explicitly and repeatedly asserted that Weinberg's coaching did not influence him, he is plainly not entitled to relief on this basis.

3. Petitioner Feinberg also objects to the district court's admission of evidence concerning other occasions on which petitioner Williams, assisted by petitioner Feinberg, used his influence on behalf of projects in which Williams had a financial interest. On one occasion, petitioner Williams boasted at a meeting with Abscam agents that he had telephoned the chairman of the New Jersey Casino Control Commission in support of an application for a casino license by the Ritz-Carlton Casino. Petitioner Feinberg boasted at the same meeting that he had also used his influence in this way. The Ritz-Carlton employed petitioner Williams's wife as a consultant and later paid petitioner Feinberg a $50,000 fee. Pet. App. 43a.

These efforts to use influence were made without any urging by government agents,[9] and the district court found that petitioners' recorded statements about the ways in which they used their influence were "made under circumstances that were designed to impress the listeners with their know-how, their awareness of political reality, their ability to achieve results, and their willingness to use the Senator's influence for financial gain" (Pet. App. 78a-79a). The other prior acts evidence concerned contacts petitioners Williams

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[9]Petitioners subsequently claimed that they had not actually attempted to use their influence in these ways, even though they had boasted of doing so in front of government agents (see Pet. App. 77a-78a).

and Feinberg made on behalf of Biocel, a corporation formed by Sandy Williams in which petitioners Williams and Feinberg both had an interest. *Id.* at 42a-43a, 78a-79a.

Petitioner Feinberg acknowledges that evidence of prior acts can be used to show predisposition (83-5108 Pet. 32). His contention appears to be that his prior acts were innocent, not criminal (*id.* at 31-32, 34-35). But Fed. R. Evid. 404(b) permits the introduction of evidence of "other crimes, wrongs, *or acts*" (emphasis added) to prove such things as predisposition. As the court of appeals explained (Pet. App. 43a-44a):

> Conduct " 'morally indistinguishable' " from the offenses charged is probative on the issue of predisposition, *United States* v. *Viviano, supra,* 437 F.2d at 299 n.3 (quoting *United States* v. *Becker,* 62 F.2d 1007, 1009 (2d Cir. 1933)), and admissible subject to the usual weighing of probative force against unfair prejudice * * *. Even if, as [petitioners] contend, the Senator's conduct in the Ritz-Carlton and Biocel matters did not violate New Jersey law, it was probative of his willingness to agree to take similar action to obtain titanium contracts from the federal government, conduct that violates federal law.

In addition to proving predisposition, this evidence was admissible in this case — as the district court noted — to prove petitioners' "motive, opportunity, intent, preparation, and method of operation" (*id.* at 78a).

Moreover, petitioner Feinberg fails to explain how this evidence could have *unfairly* prejudiced him. He was free to argue to the jury that his prior actions were legitimate and did not show a propensity for attempting to profit from the improper use of Senator Williams's influence. If the prior acts evidence was damaging to him, that was only because it did indeed tend to show such a propensity. The district

court's decision to admit that evidence was, as the court of appeals ruled, "well within [its] discretion" (Pet. App. 44a) and does not warrant this Court's review.

4. Petitioner Williams also urges that the videotaping of his meetings with undercover operatives violated the Fourth Amendment (83-256 Pet. 17-30). As petitioner Williams concedes (*id.* at 30 n.16), this claim for suppression of the videotapes was not raised before trial (see Pet. App. 57a-58a), as required by Fed. R. Crim. P. 12(b)(3). Therefore it may not now be entertained. Fed. R. Crim. P. 12(e).

In any event, it is without merit. This Court has recently declined to review a similar contention made by other Abscam defendants (see 82-1183 Br. in Opp. 12-13).[10] Moreover, as petitioner Williams appears to acknowledge, this contention is inconsistent with *United States* v. *White*, 401 U.S. 745 (1971). Indeed, by recording meetings and conversations, the government helped ensure that the most accurate possible version of the events would be brought before the jury. As the district court remarked, "the quality of evidence produced by tape recordings, particularly by the videotapes in the Abscam cases, far exceeds the sketchy, imperfect evidence availab[l]e in the usual trial based upon witnesses' unaided recollections." In fact, a defendant who has a legitimate claim that he was subjected to improper pressure by government agents is likely to be most benefitted by videotaping in a case like this, because the videotapes will bring before the jury the most accurate possible reproduction of the events at issue.

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[10] "82-1183 Br. in Opp." refers to the government's consolidated brief in opposition in *Lederer* v. *United States*, No. 82-1183; *Murphy* v. *United States*, No. 82-1187; *Thompson* v. *United States*, No. 82-1199; *Criden* v. *United States*, No. 82-1240; and *Myers* v. *United States*, No. 82-1255. The Court denied certiorari in these cases on May 31, 1983.

Contrary to petitioner Williams (83-256 Pet. 28-30), the videotaping that the government undertook in this case does not even implicate the concerns raised by Justice Harlan's dissenting opinion in *White*. The government did not record private meetings between petitioners and their families or their close personal or political associates; the government videotaped only meetings that petitioners knew were business discussions, and petitioners came to those meetings fully aware that Senator Williams's influence would be a subject of discussion. No harm to society will result if officials become wary that their conduct at meetings of this kind might later be revealed to their constituents and the public at large.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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